

WeChat or don't WeChat

In a recent Lawcover claim, all client correspondence for a business acquisition, worth \$1 million, was conducted by an employed solicitor via WeChat using her personal profile. The employed solicitor left the practice and erased the WeChat app on her phone, thereby erasing all the client correspondence.

When a claim was made against the practice alleging inadequate advice, the evidence that certain advice had been given was unavailable, making defence of the claim difficult.

Solicitors, often at the request of clients, are increasingly using WeChat, WhatsApp, Signal and other social media chat services to communicate with clients. Solicitors communicating to clients via social media platforms need to carefully consider how to manage the associated risks.

Using chat apps for client communications creates two problems for record keeping. First, it can be difficult, if not impossible, to extract a complete record of the relevant communications. Secondly, access to most chat services is almost entirely via an application on the individual's personal device and via their personal account. Where solicitors are corresponding with a client, those communications are therefore held solely on an individual's personal device and out of the control of the law practice.

This personal element creates difficulties for law practices to comply with regulation 14 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* which requires the practice to maintain a copy of their file for at least 7 years after the completion of an engagement. This may not be possible if the records are held on a personal device.

Privacy and Security

In addition to the record keeping issues, there are also questions around the end-to-end security of some popular communications platforms. Personal devices used to access these platforms are unlikely to be as secure as business devices and access to the platforms is not generally subject to the protections that may be imposed to access business applications. This may make communications on those platforms more susceptible to unauthorised access and exposes a practice to potential breaches of confidentiality.

It is well known that some social media platforms are also subject to surveillance. There have been numerous known instances of communications being blocked from transmission, unbeknownst to the parties, making those platforms unreliable as well as risky.

Privilege

A further consideration is the waiver of privilege over an 'entire file' by a client. When engagements are conducted predominately via social media, it usually means all communication is contained within a single chat. If a client adds another person to that chat, that third party will have access to the entire history of the chat, as well as future messages, and could thereby waive privilege over all legal advice previously given.

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Chat groups created to progress a deal may involve multiple parties and legal representatives to a matter. There have been instances where advice or communications have been conveyed to clients in those group chats and it is very unlikely those communications will attract the protection of legal professional privilege.

Tread carefully

If your clients will only communicate with you on a chat app then, at a minimum, solicitors should:

- ▼ Choose the most reliable device and account from which social media communications will be sent and received from clients

- ▼ Extract copies of communications on social media platforms for record keeping purposes
- ▼ Restrict communications on social media to procedural matters or quick updates
- ▼ Switch to email for legal advice and set out that advice in a more formal way
- ▼ To the extent possible, secure or lock down the chats or groups by which communications are exchanged with clients to limit the risks of inadvertent waivers of privilege.

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